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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PATRICIA CAPRITTA PAYNE, Plaintiff and Appellant, v. VOLUME SERVICES AMERICA, INC., et al., Defendants and Respondents.	D042540 (Super. Ct. No. GIC778633)

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed in part, reversed in part, and remanded.

This is a case for breach of an implied-in-fact employment contract, sexual discrimination, sexual harassment and retaliation in violation of the California Fair Employment and Housing Act (the FEHA; Gov. Code, § 12900 et seq.), and wrongful termination in violation of public policy embodied in the FEHA. Plaintiff Patricia Capritta Payne appeals a judgment entered after a jury trial, contending she is entitled to a new trial against defendants Volume Services America, Inc. (VSA), John Vingas and

C.T. Nice (collectively VSA when appropriate) because (1) the jury rendered inconsistent verdicts by, among other things, finding VSA liable for wrongful termination in violation of public policy, but finding for the defendants on the separate FEHA claims; (2) the economic and noneconomic damages awards of $10,000 and $5,000, respectively, are grossly inadequate and indicate a compromise verdict; (3) insufficient evidence supports a finding she was an "at-will" employee; and (4) the court abused its discretion by denying her leave to amend the complaint during trial.

We conclude Payne waived appellate review of the inconsistency of special verdicts issue, the jury's "at-will" employment finding is supported by substantial evidence, and the court properly exercised its discretion by denying her leave to amend her complaint during trial. We conclude, however, that Payne is entitled to a new trial on the single cause of action on which she prevailed, because the jury's economic damages award is inadequate as a matter of law and evidences a compromise verdict. We affirm the judgment in part, and reverse it in part, and remand for a new trial solely on the cause of action for wrongful termination in violation of public policy.

FACTUAL AND PROCEDURAL BACKGROUND

VSA is a national catering and food services company that provided services to the San Diego Convention Center (Convention Center). In 1993 VSA hired Payne to work at the Convention Center, and in 1994 it promoted her to Director of Catering.[1] In

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1 When events began here, VSA was known as Service America Corporation. For convenience, we refer to the company only as VSA.

that role, she worked closely with VSA's executive chef, Chris Browne. She and Browne had an acrimonious relationship.

In October 1998 Payne and three other female VSA managers met with defendant Vingas, VSA's general manager at the Convention Center, and Sharon Luhnow, of VSA's human resources department, to complain about Browne's "lack of respect, harassment and negative attitude to the female [m]anagement in the workplace," and their fear of Browne. The women reported that Browne called female employees "bitches" and referred to guns. The women signed a November 2, 1998 memorandum Payne prepared memorializing the meeting and threatening to seek legal counsel if the situation was not immediately resolved.

Vingas and Luhnow counseled Browne about his behavior toward female employees. Vingas learned, however, that after the counseling Browne told a male employee, "I am gonna get the bitches," referring to the women who complained against him. Browne admitted he made the comment, and Vingas gave him the option of resigning or being fired. Brown resigned in November 1998.

In January 2001 Payne attended a conference in Miami and learned from defendant Nice, a VSA senior vice president, that VSA had rehired Browne in 2000 for its operation in Indianapolis, and that Vingas recommended Browne for the position. Payne was shocked and told Nice that Browne had intimidated and sexually harassed her and other female employees in San Diego. She accused Vingas of withholding information from VSA regarding the reason Browne resigned in 1998. Nice was upset

and took the matter very seriously. When Payne returned to California she sent Nice a copy of the November 2, 1998 memorandum.

Nice contacted Shaun Beard, a VSA regional vice president, and informed him of the need to investigate Payne's allegations of Browne's sexual harassment. In February 2001 Nice came to San Diego and he and Beard interviewed the three women who, along with Payne, signed the November 2, 1998 memorandum. Two of the women, Maria Soto and Susie Stunich, recanted allegations of sexual harassment they made against Browne and claimed Payne coerced them into signing the November 2, 1998 memorandum. Nice concluded Browne was guilty of inappropriate behavior, but not sexual harassment, and Vingas had not covered up any sexual harassment.

Stunich and Soto also told Nice and Beard they were ready to quit working for VSA because of divisiveness between Payne and Vingas. Stunich reported that Payne told her she "wanted [Vingas] out of the Convention Center," and predicted he would be fired because of Browne's rehiring. Stunich told Nice and Beard, "[Y]ou guys need to fix this because this place is ready to explode." Soto reported that Payne asked her to "choose sides" between Payne and Vingas. In Vingas's view, Payne "had taken the position to divide and conquer the food and beverage management staff at the San Diego Convention Center, putting all of my senior managers in a position to choose sides[,] which was divisive, nonproductive and caused all of the managers to want to quit." Payne agreed "the tension was getting . . . great in the workplace" and it was "starting to affect the business."

At the conclusion of the investigation, Beard recommended to Nice that VSA offer Payne a transfer to VSA's operation at Qualcomm Stadium, without any reduction in pay or benefits, as a means of diffusing "the tension at the Convention Center." Nice also consulted with Vingas, but said he gave Vingas no authority to make any decision regarding Payne's employment. Vingas recommended that Payne be fired because he no longer trusted her and felt betrayed "knowing that she had every intention of getting me terminated over the . . . rehiring of . . . Browne." Nice believed Payne "seemed to be trying to rally the troops against" Vingas, and she was trying to get him fired.

In a meeting, Nice explained to Payne his conclusion regarding a lack of sexual harassment by Browne. He also explained that because of Payne's conduct during the investigation, including telling employees Vingas would be fired and she would be put in charge of VSA's operation at the Convention Center, and because Stunich and Soto were ready to quit, he determined "the best scenario for her would be to relocate" to Qualcomm Stadium or accept a severance package. Payne rejected those options and soon afterward VSA terminated her employment.

Payne sued VSA, Vingas and Nice. Her first amended complaint included causes of action for sexual discrimination, sexual harassment and retaliation in violation of the FEHA, wrongful termination in violation of public policy embodied in the FEHA, and breach of an implied-in-fact employment contract.

At trial, Payne's theory was that she was fired in retaliation for complaining to Nice that VSA rehired Browne and expressing her belief that he sexually harassed her and other female employees. Payne's sexual harassment and sexual discrimination claims

were not based on Browne's conduct, but rather on Vingas's conduct during Nice's investigation into her January 2001 complaint regarding Browne. Payne testified that Vingas "physically touched my body and he got into my space, he used foul language, and he was creating a situation of intimidation and fear." Payne elaborated that once Vingas put his hand around her throat. She admitted she never reported the incident to anyone or mentioned it during her lengthy deposition.

The jury was presented with a special verdict form that asked them to determine whether VSA discriminated against Payne on the basis of gender, and whether she was subjected to a hostile work environment based on gender. The jury answered "no" to those questions. Regarding Payne's retaliation claim, the jury was then asked to determine whether VSA, Vingas or Nice took "adverse employment action against [her] because of her complaint to . . . Nice[.]" The jury also answered "no" to that question.

Although the jury found against Payne on her FEHA claims, the special verdict form allowed the jury to continue to the following question: "Do [you] find that . . . VSA terminated [Payne's] employment in violation of the public policy against retaliation, gender discrimination or gender harassment?" The jury answered "yes" to that question. After determining Payne did not fail to reasonably mitigate her damages, the jury awarded her $10,000 in economic damages and $5,000 in noneconomic damages.

DISCUSSION

I

Inconsistent Special Verdicts

Payne contends the judgment must be reversed because the jury returned inconsistent special verdicts. She complains that the jury found against her on FEHA claims for gender discrimination, gender harassment and retaliation, but found for her on her claim for tortious discharge in violation of public policy, the underlying basis of which was a violation of FEHA statutes.

Employment having no specified term is presumed to be "at will," meaning either party may terminate it with or without cause on notice to the other. (Lab. Code, § 2922.) However, the employer's right to discharge an "at will" employee " 'is still subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal.' " (*Jacobs v. Universal Development Corp*. (1997) 53 Cal.App.4th 692, 698, citing *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 665.) " '[W]hen an employer's discharge of an [at will] employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions.' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 501, citing *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.)

The FEHA prohibits an employer from terminating or otherwise discriminating against an employee, or harassing an employee, on enumerated grounds, including sex or

gender. (Gov. Code, § 12940, subds. (a), (j)(1).) The FEHA also prohibits an employer from retaliating against an employee because he or she has opposed practices forbidden under the FEHA. (Gov. Code, § 12940, subd. (h).) FEHA provisions may provide the policy basis for a claim for wrongful termination in violation of public policy. (*Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 227; *Estes v. Monroe* (2004) 120 Cal.App.4th 1347, 1355.)

Inconsistent verdicts are deemed "against the law," and the remedy may be a new trial. (*Shaw v. Hughes Aircraft Co*. (2000) 83 Cal.App.4th 1336, 1344.) When possible, we must harmonize special verdicts and draw conclusions that would explain apparent conflicts. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182.) VSA asserts the special verdicts here may be interpreted as consistent because the question regarding retaliation in violation of the FEHA was specifically based on Payne's complaint to Nice, but the question regarding wrongful termination in violation of public policy did not mention Nice or specify any particular conduct. VSA asserts the jury could reasonably reject the FEHA retaliation claim, but find Payne's firing was in retaliation for her 1998 allegations of Chris Browne's sexual harassment. The trial court attempted to reconcile the verdicts by finding Payne "may have been terminated for complaining to Vingas about perceived sexual harassment by Vingas or Brown [*sic*]."

We conclude the special verdicts are inconsistent, and efforts to reconcile them are futile. A jury could not reasonably find VSA fired Payne in 2001 because she complained in 1998 about Browne's conduct. Moreover, there is no evidence that Payne ever complained to Vingas that he was sexually harassing her, and most notably, Payne's

only theory of retaliation was based on her complaint in January 2001 to Nice regarding VSA's rehiring of Browne. Nonetheless, under waiver principles reversal on this ground is unwarranted.

Ordinarily, no objection is required to preserve appellate review of a claim of inconsistent verdicts. (*Lambert v. General Motors, supra,* 67 Cal.App.4th at p. 1182; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 187; *Cavallaro v. Michelin Tire Corp*. (1979) 96 Cal.App.3d 95, 105; *Campbell v. Zokelt* (1969) 272 Cal.App.2d 315, 320; *Remy v. Exley Produce Express, Inc*. (1957) 148 Cal.App.2d 550, 555.) This rule is logical because an inconsistency may not immediately appear from the verdict form, and a party may be precluded from making an appropriate objection between the announcement of the verdict and the discharge of the jury. (See *Mitchell v. Elrod* (1995) 275 Ill.App.3d 357, 364 [655 N.E.2d 1104, 1109].)

This reasoning, however, is inapplicable when the failure to object reflects a tactical decision to obtain a benefit by remaining silent. Courts have held that a party waives his or her right to challenge the form of a verdict if the record shows the failure to object was "the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.' " (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, fn. 2; *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 879; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 17; see also *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) "[A]ppellate courts generally are unwilling to second guess the tactical choices made by counsel during trial. Thus where a deliberate trial strategy results in an outcome disappointing to the advocate,

the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Mesecher v. County of San Diego*, at p. 1686.)

Here, the record shows Payne's failure to object resulted from a deliberate tactical decision. The inconsistencies in the special verdicts were apparent from the face of the verdict, and the court gave Payne all the time she requested to consider the verdicts. After the verdicts were announced, the court polled the jury and asked counsel if they had any questions before it discharged the jury. The court allowed Payne's cocounsel to privately confer in the courtroom, and then to leave the courtroom to further confer. When counsel returned, they advised the court that "[a]fter discussion, we have nothing further, your Honor."

Given these circumstances, Payne had ample time to raise the inconsistency issues before the jury was discharged and to request further jury deliberations. Indeed, given the jury's findings on the FEHA causes of action, her counsel likely understood there was a substantial probability that on further deliberation the jury would also resolve the wrongful termination in violation of public policy cause of action against her, resulting in a lack of any recovery.[2]

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2 We also note "[i]t is incumbent upon counsel to propose a special verdict that does not mislead a jury into bringing in an improper special verdict." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960, fn. 8.) Payne does not contest that she drafted the verdict form here, which inexplicably allowed the jury to consider the wrongful termination in violation of public policy cause of action after finding against her on each of the three FEHA causes of action.

II

Damages Awards

Payne contends the awards of $10,000 in economic damages and $5,000 in noneconomic damages are inadequate as a matter of law and indicate a compromise verdict, and the court improperly denied her motion for a new trial based on inadequate damages. Principally, Payne asserts the jury ignored uncontested evidence that if her termination was wrongful, she incurred substantially more than $10,000 in economic damages.

"A new trial shall not be granted upon the ground of . . . inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.) "The judge is not permitted to substitute his [or her] judgment for that of the jury on the question of damages unless it appears from the record the jury verdict was improper." (*Bigboy v County of San Diego* (1984) 154 Cal.App.3d 397, 406.) "It is well settled that this ground of motion for a new trial appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in the absence of a showing of abuse of discretion." (*Bencich v. Market St. Ry. Co.* (1937) 20 Cal.App.2d 518, 520.)

Payne cites *Shaw v. Hughes Aircraft Co., supra,* 83 Cal.App.4th 1336, in which the plaintiff sued his former employer for breach of contract, breach of the implied covenant of good faith and fair dealing, and wrongful termination in violation of public policy, alleging the stated reason for the termination, his sexual harassment of

coemployees, was pretextual and the real reason was retaliation for his whistle blowing activities. The jury found for the defense on the breach of contract claim, but awarded the plaintiff more than $400,000 for breach of the implied covenant of good faith and fair dealing. The jury also found in favor of the plaintiff on the wrongful discharge claim, but awarded him no damages. (*Id.* at p. 1341, fn. 4)

The court held the jury's verdicts on the breach of contract and breach of implied covenant causes of action were irreconcilable, and both claims had to be retried. (*Shaw v. Hughes Aircraft Co., supra,* 83 Cal.App.4th at p. 1344.) The court rejected Shaw's argument that instead of ordering a new trial it should sustain the jury's award on the implied covenant cause of action as damages for wrongful discharge. The court explained the jury's finding of wrongful discharge could not stand because "[w]hen the issue of liability is sharply contested, and the jury awards inadequate damages, the only reasonable conclusion is the jury compromised the issue of liability, and a new trial is required." (*Id.* at p. 1346.) The court found a clear inadequacy of damages on the wrongful termination cause of action because the defendant's own expert calculated Shaw's minimum loss at $200,000. Because of a possible compromise verdict, a new trial on *all* issues was required, as opposed to merely the damages issue. (*Ibid.*; see also *Wilson v. R. D. Werner Co.* (1980) 108 Cal.App.3d 878, 884; *Rose v. Melody Lane* (1952) 39 Cal.2d 481, 488-489 [when jury fails to compensate plaintiff for damages *indicated by the evidence* only reasonable conclusion is that jury compromised on liability issue and new trial limited to damages is improper].)

Payne sought approximately $3.5 million in economic damages, the lion's share of which consisted of future lost earnings and benefits through the year 2024, when she would turn 66 years of age, based on the assumption she could never find comparable employment. Regarding "backpay," her expert witness calculated she lost $147,161 in wages and benefits between her March 2001 termination and September 10, 2002.[3] VSA's own expert calculated that Payne's backpay damages were between $79,052 and $119,331, after the deduction of mitigating income, depending on whether she was reasonably out of comparable work for one year or one and a half years. The jury was instructed it was not bound by expert opinion, but "you may not arbitrarily or unreasonably disregard the economic . . . testimony in this case."

VSA submits the economic damages award is adequate because it comports with the following jury instruction: "If you find that plaintiff is entitled to recover damages for a wrongful termination in violation of public policy, damages must include: the value of any loss of compensation and benefits *under the employment contract*, any consequential economic damages, or any damages for emotional distress suffered by plaintiff." (Italics added.) VSA asserts that since Payne was an "at-will" employee who

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3 Trial was held in February 2003. It appears that Payne's expert used September 10, 2002 for the "backpay" calculation because it was near the date of his deposition. The term "backpay" generally refers to " 'the amount that plaintiff would have earned but for the employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment. Back pay includes . . . fringe benefits (such as medical insurance), and all other compensation that would have been obtained but for the discrimination.' " (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1144-1145, fn. 3.)

could be terminated at any time, she cannot recover any backpay or other lost wages "under the employment contract."

VSA misunderstands the nature of a tortious discharge claim. An at-will employee may not recover lost wages on a breach of contract theory, but the termination of *any* employee in violation of public policy is tortious and " 'subject[s] the employer to liability for compensatory and punitive damages under normal tort principles.' " (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1101, overruled on another point in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6; *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167, 178.) " 'As *Tameny* explained, the theoretical reason for labeling the discharge wrongful in such cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy . . . . [T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and [those] in which the employee has a contract for a specified term. The tort is independent of the term of employment.' " (*Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at p. 667.) When a tortious discharge occurs, "the nature of the employee's relationship with the employer, whether at will or contractual, is essentially irrelevant." (*Id.* at p. 667, fn. 7.)

BAJI No. 10.43, from which the above instruction was taken, provides that in a tortious discharge case the damages *must* include the value of any loss of compensation and benefits caused by the wrongdoing. The contract referred to in the jury instruction

here refers to the agreement between VSA and Payne regarding her rate of pay and benefits, which provide the basis for a damages calculation and award. Although backpay is "a traditional contract remedy," it is also recoverable in a claim for tortious discharge as such a claim is designed to make the wronged employee whole. (*Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d at pp. 176-177, fn. 11, citing *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 190; *Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 666; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2003) ¶¶ 17:135, 17.292, p. 17-14, p. 17-35; Civ. Code, § 3333 ["For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."].)

Additionally, VSA asserts the economic damages award is adequate because it vigorously disputed Payne's expert's calculations. That is true insofar as *future* loss of earnings is concerned, but VSA ignores its own expert's calculation that if Payne was wrongfully terminated she incurred backpay damages of between $79,052 and $119,331. VSA's expert testified that "[i]f accepting the position at Qualcomm Stadium is found to be reasonable mitigation, then there would have been no loss" to Payne. The jury, however, rejected the notion that Payne failed to mitigate her damages. In denying Payne a new trial, the lower court explained that "[w]hile the jury concluded [she] did not fail to mitigate her damages, it could also have believed that [she] would be able to find a

comparable job in the future." The court's analysis, while true, also ignores the issue of backpay.

VSA also relies on Nice's testimony that he had been in the hospitality industry for approximately 23 years, and there are generally numerous openings in the industry. As VSA's counsel acknowledged at trial, however, the testimony "[g]oes to mitigation." The same is true of VSA's speculation that the jury may have awarded Payne $10,000 in economic damages because that figure is close to the amount VSA offered her in a severance package.

We conclude the trial court's denial of a new trial was an abuse of discretion, and a full new trial is required solely on Payne's cause of action for wrongful termination in violation of public policy. The jury found VSA liable for that tort and that Payne did not fail to mitigate her damages, yet it awarded her only $10,000 in economic damages despite undisputed evidence that if VSA wrongly fired her she lost a minimum of between $79,052 and $119,331 in past wages and benefits. Indeed, in closing argument VSA's counsel urged the jury to accept the testimony of its expert because, unlike Payne's expert, he "was trying to calculate honestly what [Payne's] damages actually have been." It appears the jurors disagreed on the liability issue, and reached a compromise verdict by awarding a low amount of economic damages unsupported by any evidence. (*Bencich v. Market St. Ry. Co., supra,* 20 Cal.App.2d at pp. 529-530.)[4]

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4 Given our holding, we are not required to address Payne's assertion regarding the inadequacy of the $5,000 noneconomic damage award. However, we note that in closing argument, her counsel did not request any specific amount of noneconomic damages and

III

Evidence of "At-Will" Employment

Payne contends she is entitled to a new trial on her breach of contract cause of action because the jury's finding she was an "at-will" employee lacks evidentiary support. "When a judgment is attacked as being unsupported by the evidence, 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact].' " (*PWS, Inc. v. Ban* (1991) 234 Cal.App.3d 223, 230.)

The presumption of "at-will" employment in Labor Code section 2922 "does not prevent the parties from *agreeing* to any limitation, otherwise lawful, on the employer's termination rights." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336.) An example of a contractual departure from "at-will" status is an agreement that the employment relationship will continue indefinitely, pending the occurrence of an event such as the employer's dissatisfaction with the employee's service or the existence of some other good cause for termination. (*Ibid.*)

"The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations." (*Guz v. Bechtel National, Inc., supra,* 24 Cal.4th at p. 336.) Several factors may connote the existence of an implied-in-fact agreement, including the

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suggested the jury could in its discretion award as little as $5 per day for 30 months, which is approximately $4,500. Counsel characterized economic damages as "more important."

employer's personnel policies or practices, employer assurances of continued employment and practices in the relevant industry. (*Id*. at pp. 336-337, citing *Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 680.) "Every case turns on its own facts." (*Guz,* at p. 337.)

It is undisputed that VSA had an express "at-will" employment policy, as set forth in its Employee Handbook, Code of Employer/Employee Relations and other personnel documents. Payne asserts, however, that she presented undisputed evidence she was exempted from VSA's "at-will" policy. She relies on contracts between VSA and the Convention Center, under which VSA would face a substantial fine if it replaced any of its top three employees at the Convention Center, the general manager, the director of catering, and the executive chef, without the Convention Center's prior approval. The Convention Center, however, agreed not to unreasonably withhold its approval.

Carol Wallace, the Convention Center's chief executive officer, testified "the purpose of the language was to make sure that before [VSA] made any replacements that we were consulted or informed of those replacements. It wasn't that [VSA] could not, it's just that we wanted to make sure that . . . we had three positions here that were dedicated to the Convention Center and did not want those positions changed without some notification . . . regarding what the plans would be to replace those people, or how we handled the operation." Before terminating Payne's employment, VSA obtained the Convention Center's permission to do so without incurring a fine.

VSA's contracts with the Convention Center affected the rights of only those parties. The contracts did not affect the "at-will" status of Payne, who was not a party to

the contracts and did not allege a third party beneficiary theory. In any event, the contracts did not guarantee any length of service to VSA's top employees, they merely required VSA to obtain the Convention Center's approval before replacing them.

Payne points out that VSA's written "at-will" policy contains an introductory paragraph entitled "Scope," which states: "All regular employees of [VSA], except those covered by a collective bargaining agreement or by a client-mandated contract." She asserts "client-mandated contract" refers to employment agreements between VSA and the employees in the three positions referred to in the contracts between VSA and the Convention Center, and the interpretation of the term "client-mandated contract" is one of law for the trial court's decision. Payne suggests the trial court erred by not interpreting the contract.

Payne, however, does not cite the record to show she made any such argument to the trial court. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) Accordingly, where a party provides a brief "without argument, citation of authority or record references establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)[5]

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5 Although the "Scope" section of the document refers to "client mandated contract," the immediately following section, titled "Statement of Policy," provides: "It is the policy of [VSA] that all employees, *except those who have collective bargaining*

Payne also contends her testimony established VSA promised her long-term employment. She testified that Beard "used to talk to me all the time about working with him on training and development, moving forward in the company," and he "alluded to the fact that we would be together for a long time in the training, maybe in future positions, as he climbed up the ladder, I would climb up with him." Payne also testified that from 1997, when she considered taking a management position with VSA in Baltimore, Nice spoke to her about potential future assignments and "was always projecting about where I might go." Additionally, Payne testified that Angelo Fortuna, another VSA vice president, spoke with her about potential promotions. In a 1997 letter, Fortuna wrote that he was disappointed Payne did not accept the Baltimore position since she "would have brought a wealth of experience [and] an ardor for improvement and a high level of creativity to the Baltimore account." Fortuna also wrote, "we'll keep you at the ready for future developments."

Given VSA's express "at-will" policy, we conclude the jury's finding of "at-will" employment is supported by substantial evidence. Payne's testimony showed she enjoyed lengthy, successful employment with VSA, but in *Guz v. Bechtel National, Inc., supra,* 24 Cal.4th 317, the court explained that such evidence "cannot *alone* form an implied-in-fact contract that the employee is no longer at will." (*Id.* at p. 342.) "Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards

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agreements, are employed at the will of [VSA] and are subject to termination at any time, for any reason." (Italics added.) The section does not exclude employees under a "client mandated contract," whatever its definition.

for the employee's continuing valued service; they do not, *in and of themselves,* additionally constitute a contractual guarantee of future employment security. A rule granting such contract rights on the basis of successful longevity alone would discourage the retention and promotion of employees." (*Ibid.*) Payne's testimony does not show VSA agreed to impose any restrictions on its prerogative to terminate her employment at any time for any or no reason.

IV

Leave To Amend

Payne's first amended complaint included a cause of action for defamation, which alleged: "The alleged reasons for [Payne's] termination, which were repeated by . . . Nice, Vingas, and other managerial employees of [VSA] in the presence of third parties attacked [Payne's] professional abilities and tended to damage her in her business or profession." In discovery, in a summary judgment motion, and in Payne's opening statement, she revealed that her defamation cause of action was based on comments Nice or Vingas made to Carol Wallace. The jury found against Payne on her defamation cause of action, and she does not challenge its finding. Rather, she contends the trial court abused its discretion by denying her request during trial to amend her complaint to add further allegations of defamation.

Payne called Ann Marie Curran to the stand. Curran was employed by VSA between September 1999 and March 2002, and she testified that after VSA fired Payne, Vingas "alluded to the fact that when she was . . . employed with [VSA] that the choices that she made as the Director of Catering . . . were not beneficial to the overall . . .

financial stability of the unit. He often said that she made decisions that made us lose money, . . . and that she just didn't make good decisions. . . . [A]lso on occasion he alluded to the fact that she was kind of, you know, crazy, psycho, did dumb things and that she needed to be on some serious medication."

Out of the jury's presence, VSA objected that Curran's testimony amounted to "sandbagging" since Payne's defamation cause of action was based solely on comments allegedly made to Wallace. Payne's counsel requested leave to amend her complaint, advising the court he learned about Vingas's comments to Curran only recently. VSA objected to an amendment on the ground of prejudice, since it had not taken Curran's deposition. The court reserved ruling and granted Payne's request to file a written request for leave to amend.

The court, however, allowed Curran to resume testifying. She stated that Vingas told her Payne "did not sell events well at the Convention Center, that she gave the house away and was not making money for the company." Additionally, Vingas told her Payne was "mentally imbalanced, . . . that she just didn't have her . . . act together, that . . . she had drastic mood swings and . . . she ought to be on medication," specifically Prozac. Curran also testified she did not believe Vingas's comments, and they did not diminish her belief in Payne's capabilities.

Later, after considering the parties' written papers, the court denied Payne's request for leave to amend because of prejudice to VSA.

Although "amendments should be liberally allowed so that all of the issues may be properly presented, the question whether the filing of an amended pleading should be

allowed at the time of trial is ordinarily committed to the sound discretion of the trial court." (*Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 585.) "However, the trial court's discretion is not unlimited. 'The cases on amended pleadings during trial suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . no prejudice can result.' " (*North 7th Street Associates v. Constante* (2001) 92 Cal.App.4th Supp. 7, 10.) Because Payne sought to allege new facts, we cannot say the court abused its discretion by denying leave to amend on prejudice grounds.

DISPOSITION

The judgment is reversed insofar as it concerns Payne's cause of action for wrongful termination in violation of public policy, and the matter is remanded for a new trial on that cause of action only. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.